INDEX

CITATIONS

701998—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 177

JOSEPH ALFANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the circuit court of appeals (R. 156–157) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 14, 1946 (R. 157–158). The petition for a writ of certiorari was filed on June 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTION PRESENTED

Whether a conviction under Section 48 of the Criminal Code, punishing any person who receives, etc., property stolen from the United States "by any other person," should be reversed because the indictment did not expressly allege that the property had been stolen by someone other than the defendants.

STATUTE INVOLVED

Section 48 of the Criminal Code (18 U. S. C. 101) provides:

> Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than $5,000, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender.

STATEMENT

An indictment in one count was returned against petitioner and another in the District Court for the District of New Jersey charging

that they "did have and retain in their possession with intent to convert to ther own use and gains, property, goods and chattels of the United States to wit, 12 United States Navy sheepskin lined coats of the value of thirteen dollars and fifty cents ($13.50) each, and of the total value of one hundred and sixty-two dollars ($162), such property, goods and chattels having been therefore stolen and purloined and the said Joseph Alfano and Patrick Cuttitta knowing the same to have been so stolen and purloined; * * *" (R. 3). After a trial by jury, petitioner was found guilty and he was sentenced to imprisonment for two years and six months and to pay a fine of $500 (R. 1–2). On appeal to the Circuit Court of Appeals for the Third Circuit, the conviction was affirmed (R. 156–158).

It appears from the evidence that early in November 1944, 34 of 600 sheepskin coats which were being cleaned by a New Jersey establishment for the United States Navy were stolen from the cleaning plant (R. 5–8, 12–13). Shortly thereafter, petitioner had some of these coats on his premises (R. 115), which he attempted to sell (R. 38–40, 55). Petitioner testified that he was asked to store the coats by a man known to him only as "Jimmie" (R. 101–102), but admitted that he thought they were stolen because they were Navy coats. They were marked "Navy Department." (R. 39, 103, 116, 118.)

ARGUMENT

The only question raised by the petitioner is whether the indictment must now be held fatally defective because it did not allege a "necessary element of the offense, namely; that the property had been stolen by someone other than the defendant" (Pet. 4). At no time in the trial court did petitioner raise any objection to the sufficiency of the indictment in the usual ways as by demurrer, motion to quash, or motion in arrest of judgment (see R. 1–2, 72, 142–143). Moreover, the trial judge correctly summarized the elements of the offense at the outset of his instructions to the jury (R. 144) and stated in this regard that "it must appear to the jury that [the property] had been previously stolen by some person other than the defendant" (R. 145).

While it must be conceded that the indictment was inartfully drawn in not specifically charging that the property was stolen by some "other person," nevertheless we believe that the circuit court of appeals was correct in concluding "that a fair construction of the indictment, as a whole, supplies the missing words" (R. 157), for it alleged that the defendants had and retained in their possession the described property of the United States which had theretofore been stolen and that the defendants knew the property had been so stolen. The latter allegation as to knowledge, when read in the light of the preceding

allegations, fairly implies that the property had been stolen by a person or persons other than the defendants. In these circumstances, the case is controlled by R. S. 1025 (18 U. S. C. 556) which provides in pertinent part:

> No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *.

The rule is firmly established that an indictment is sufficient even as against timely attack if it sets forth the essential elements of the offense charged with sufficient definiteness and certainty to apprise the defendant of the nature of the accusation against him and to protect him against further prosecution for the same offense. See, e. g., *Hagner* v. *United States,* 285 U. S. 427, 431–433; *Lamar* v. *United States,* 241 U. S. 103, 116; *Braatelien* v. *United States,* 147 F. 2d 888 (C. C. A. 8); *Mitchell* v. *United States,* 143 F. 2d 953 (C. C. A. 10); *Knight* v. *United States,* 137 F. 2d 940 (C. C. A. 8); *Moore* v. *United States,* 128 F. 2d 974 (C. C. A. 5); *Bersio* v. *United States,* 124 F. 2d 310, 314 (C. C. A. 4), certiorari denied, 316 U. S. 665. In the *Hagner* case, this Court said (p. 433): "It, of course, is not the intent of § 1025 [R. S.] to dispense with the rule

which requires that the essential elements of an offense must be alleged; but it authorizes the courts to disregard merely loose or inartificial forms of averment. Upon a proceeding after verdict, at least [as in the instant case], no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." Obviously, petitioner was not prejudiced in making his defense by the failure to make the statutory allegation in question, or he would have made timely objection in the trial court. If the indictment left open the possibility that petitioner and not some other person was the thief, that was a fact of which he had the best knowledge and could have offered by way of defense. *Taylor* v. *United States,* 142 F. 2d 808 (C. C. A. 9), certiorari denied, 323 U. S. 723. Petitioner's testimony is inconsistent with any idea that he stole the property, and the trial judge instructed the jury that it must find that it was stolen by someone else. Additionally, petitioner's conviction here effectively bars a second prosecution for the same offense. This case is much the same as *Reynolds* v. *United States,* 152 F. 2d 586 (C. C. A. 5), certiorari denied April 22, 1946, No. 852, O. T. 1945, in which it was unsuccessfully urged that an indictment under the National Stolen Property Act was void because it failed to negative the defendant's ownership or right to possession of the stolen property.

Since it is clear that petitioner was neither misled nor prejudiced by the omission of which he complains, the indictment should not now be held invalid after a fair trial and verdict establishing his guilt beyond a reasonable doubt. See, e. g., *United States* v. *Wagoner,* 143 F. 2d 1 (C. C. A. 7), certiorari denied, 323 U. S. 730; *Keys* v. *United States,* 126 F. 2d 181 (C. C. A. 8), certiorari denied, 316 U. S. 694; *United States* v. *Strewl,* 99 F. 2d 474 (C. C. A. 2), certiorari denied, 306 U. S. 638; *Tudor* v. *United States,* 142 F. 2d 206 (C. C. A. 9).

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of substantial importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

JULY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946